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No. 01-1437

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

BEATRICE BRANCH, RIMS BARBER, L.C. DORSEY, DAVID RULE, JAMES WOODWARD, JOSEPH P. HUDSON AND ROBERT NORVEL,
Appellants

v.

JOHN ROBERT SMITH, SHIRLEY HALL and GENE WALKER, and ERIC CLARK, Secretary of State of Mississippi, MIKE MOORE, Attorney General of Mississippi, RONNIE MUSGROVE, Governor of Mississippi, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Appellees

On Appeal From The United States District Court
For The Southern District of Mississippi

BRIEF OF *AMICI CURIAE* ROBERT C. JUBELIRER AND MATTHEW J. RYAN IN SUPPORT OF AFFIRMANCE ON A NARROWER GROUND

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INTEREST OF *AMICI CURIAE*[1]

Robert C. Jubelirer is the Lieutenant Governor of the Commonwealth of Pennsylvania and the President *Pro Tempore* of the Pennsylvania Senate. Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives.

Amici are defendants in *Vieth v. Commonwealth*, an action presently pending before a three-judge court in the United States District Court for the Middle District of Pennsylvania (No. 1:CV-01-2439). In that case, plaintiffs challenged the constitutionality of state legislation (Act 1) putting in place a congressional redistricting plan for the Commonwealth of Pennsylvania following the 2000 decennial Census. Implementation of Act 1 was enjoined on the basis of a 19-person population deviation held to violate the principle of one-person, one-vote. 195 F. Supp.2d 672 (April 8, 2002) (three-judge court). The propriety of that and other rulings in the federal court proceeding are presently at issue in three direct appeals and a conditional cross-appeal before this Court (Nos. 01-1817, 01-1823, 01-1873 & 02-135). Following the invalidation of the Act 1 plan, the Pennsylvania General Assembly passed another congressional redistricting plan (Act 34), which the federal court plaintiffs allege does not cure the unconstitutionality found in the Act 1 plan.

Amici were also respondents in a state court action challenging the Act 1 plan – *Erfer v. Commonwealth* (Pa. Supreme Ct. No. 14 M.M. 2002; Pa. Cmwlth. Ct. No. 10 M.D. 2002). There, the Supreme Court of Pennsylvania, at petitioners' request, assumed plenary jurisdiction of and

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[1] Both Appellants and Appellees consent to the filing of this *amicus* brief. Letters of consent are on file with the Clerk of Court. No counsel for a party authored this brief, in whole or in part, and no person or entity other than the named *amici* made a monetary contribution to the preparation of this brief. *See* Supreme Court Rule 37.6.

addressed only petitioners' state constitutional claims and ultimately dismissed them. 794 A.2d 325 (Pa. 2002).

The interpretation of U.S. CONST. art. I, §4, the core of the present appeal, was addressed in the state court proceedings in Pennsylvania and is implicated in two ways in the federal court proceedings involving *amici*.[2] In their role as defendants and also as Presiding Officers of the Pennsylvania General Assembly (the body given exclusive authority by U.S. CONST. art. I, §4 to do congressional redistricting for Pennsylvania), *amici* have a substantial interest in the proper interpretation of this critical constitutional provision.[3]

SUMMARY OF ARGUMENT

The decision of the three-judge court below that U.S. CONST. art. I, §4 barred the Chancery Court of the First Judicial District of Hinds County, Mississippi from

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[2] In the state court proceedings in *Erfer*, *amici* argued that under a proper interpretation of U.S. CONST. art. I, §4 no independent state constitutional claims had been or could have been presented. *See* 794 A.2d at 331 (rejecting argument with little analysis).

In the federal court proceedings in *Vieth* concerning Act 1, plaintiffs argued to the three-judge court and to this Court (in their Jurisdictional Statement for Appeal No. 01-1873) that U.S. CONST. art. I, §4 operates as a restriction against partisan gerrymandering independent of the Fourteenth Amendment. In connection with the Act 34 plan (which replaced the Act 1 plan), plaintiffs contend that a county's alteration of a voting precinct boundary forming part of the boundary between two congressional districts causes a greater population deviation in the Act 34 plan than in Act 1. *Amici* responded, *inter alia*, that such alteration cannot affect the congressional boundary line set by Act 34 because to do so would violate U.S. CONST. art. I, §4.

[3] *Amici* adopt the Statement of the Case set forth in the Appellees' Motion to Affirm.

adopting a congressional redistricting plan should be affirmed but on narrower grounds. Article I, §4 does not bar state courts from addressing challenges to congressional redistricting plans so long as the challenges are based on federal law. A state court, however, is barred from addressing challenges to the validity of a congressional redistricting plan based solely, as here, on state law.

ARGUMENT

I. Narrower Ground For Affirmance

The decision below should be affirmed but on a narrower ground as to the interpretation of U.S. CONST. art. I, §4 than that employed by the three-judge court. Significantly, Appellants, who were plaintiffs in the action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, raised no federal law-based challenges in state court. Rather, they sought injunctive relief "to insure compliance with Mississippi law." *See* Motion to Affirm at 3 (citing Mtn. App. 1).

A state court (provided it has jurisdiction under state law) must, under the Supremacy Clause (U.S. CONST. art. VI, cl. 2), invalidate a duly-enacted congressional redistricting plan that violates the federal constitution or federal law. It can then proceed to draw a replacement plan should the state legislature fail to do so. However, as discussed below, a state court can neither invalidate nor draw a congressional redistricting plan based solely on a violation of state statutory or state constitutional law because actions of a state legislature taken pursuant to U.S. CONST. art. I, §4 are subject only to federal requirements.

II. Interpretation Of Key Constitutional Provisions

A. U.S. CONST. art. I, §4

U.S. CONST. art. I, §4 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This provision is an express constitutional grant of authority to state legislatures and to Congress to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the words of art. I, §4 "embrace authority to provide a complete code for congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970) ("In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable to do so"). As Justice Black noted in *Oregon*, U.S. CONST. art. I, §4 "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the elections of all state and federal officers and those who wanted Congress to make laws governing national elections." 400 U.S. at 119 n.2 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-92 (1st ed. 1833)).

There is no question that legislation enacted pursuant to U.S. CONST. art. I, §4 is subject to review under federal constitutional principles. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (authority granted under U.S. CONST. art. I, §4 "does not extinguish the State's responsibility to observe the limits

established by the First Amendment rights of the State's citizens"); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964) (U.S. CONST. art. I, §4 cannot be interpreted in a manner that would "immunize" from judicial scrutiny a congressional redistricting plan that debases a citizen's right to vote in violation of the federal constitution).

B. U.S. CONST. art. II, §1, cl. 2

This Court recently considered a parallel constitutional provision (U.S. CONST. art. II, §1, cl. 2), which provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ... ." Like Article I, §4, Article II, §1, cl. 2 provides an exclusive grant of authority to the legislatures of each state. As this Court explained in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (*per curiam*):

> [I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the elections of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution.

See also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (the federal constitution provides a role for the states in the federal electoral process only in select clauses which are "express delegations of power to the States to act with respect to federal elections").

In *Palm Beach County*, this Court intimated that the decision of the Supreme Court of Florida changing the manner in which the state's electors are to be selected under state law violated the exclusive power of the state

legislature under U.S. CONST. art. II, §1, cl. 2.[4] The *per curiam* opinion cited the cautionary language in *McPherson v. Blacker* that states:

> [Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall' and if the words 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

531 U.S. at 76 (quoting 146 U.S. 1, 25 (1892) (brackets original)).

In the subsequent case of *Bush v. Gore*, 531 U.S. 98, 103 (2000), this Court granted *certiorari* to address the following question: "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution ... and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses." The *per curiam* opinion in

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[4] The remand in *Palm Beach* directing the Supreme Court of Florida to identify the "extent" to which it had relied on the state constitution, *see* 531 U.S. at 78, when assessed in the context of the case as a whole, suggests that, if the state court had relied exclusively on substantive provisions of the state constitution, it may have run afoul of U.S. CONST. art. I, §4. To the extent, however, that the Supreme Court of Florida relied on the state constitution as an interpretative tool to analyze the meaning of the Florida Election Code, such use would not have raised an issue under U.S. CONST. art. I, §4.

Bush v. Gore invalidated the state court decision on the grounds that it required a remedy which violated equal protection.

Chief Justice Rehnquist, joined in his concurring opinion by Justices Scalia and Thomas, would have reversed the decision of the Florida Supreme Court on the additional ground that it violated U.S. CONST. art. II, §1, cl. 2. *See Bush v. Gore*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

The concurring Justices first explained why federal principles governed:

> Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, §4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that 'each State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President. ... In McPherson v. Blacker, we explained that Art. II, § 1, cl. 2, 'conveys the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

Id. at 112-114 (Rehnquist, C.J., concurring) (internal citations omitted, emphasis original).[5]

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[5] To the extent that Justice Stevens in *Bush v. Gore* suggested that the legislative power in Florida was subject to

After cautioning that "with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate," *id.* at 114, the concurring Justices then offered their alternative holding:

> What we would do in the present case is precisely parallel [to the holding in *Bouie v. City of Columbia*, 387 U.S. 347 (1964)]: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.

Id. at 115 (Rehnquist, J., concurring) (footnote omitted). They also explained that:

> This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

Id. (Rehnquist, J., concurring) (emphasis original).

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judicial review pursuant to the Florida Constitution, he was in the dissent and appeared, moreover, to suggest that the legislation was subject to judicial review in the state courts, not that such review would be conducted under substantive provisions of the state constitution imposing greater limitations than the federal constitution. *See* 531 U.S. at 123-24 (Stevens, J., dissenting).

C. Federal law governs

As the *Bush* cases and earlier persuasive authority suggest, federal law governs review of legislation enacted by state legislatures under the authority of U.S. CONST. art. I, §4. *See Palm Beach County Canvassing Board*, 531 U.S. at 76; *Bush v. Gore*, 531 U.S. at 111-16 (Rehnquist, C.J., concurring); *see also Opinion of the Judges*, 37 Vt. 665 (1864) (state legislation providing that absentee Civil War soldiers could vote in elections for state and federal offices from outside the state invalidated under state constitution with regard to state offices but upheld as authorized by U.S. CONST. art. I, §§2 & 4 with regard to federal offices); *Opinion of the Justices*, 45 N.H. 595, 599 (1864) (state legislation vesting absentee Civil War soldiers with right to vote for federal Representatives and electors upheld under U.S. CONST. art. I, §4 even though in direct conflict with state constitution; "the question as to the election of Representatives to Congress and of Electors of President and Vice President is governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States"); *see also Baldwin v. Trowbridge*, 2 BARTLETT CONTESTED ELECTION CASES, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess. 46, 48 (1866) (Majority Report from Committee on Elections resolving to seat Rowland E. Trowbridge as Representative from 5th Congressional District of Michigan; reasoning that votes cast by Civil War soldiers outside of Michigan were valid even though forbidden by state constitution because (1) power to direct time, place and manner of holding elections for Representatives was conferred on state legislature *eo nomine*, and not on convention authorized to prescribed fundamental law of the state; and (2) "the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States" via the state constitution); *McPherson*, 146 U.S. at 34-35 (citing

Senate Rep. 1st Sess., 43 Cong. No. 395 (1874)).[6] Various commentators have also embraced this interpretation of the *Bush* cases and the relevant constitutional provisions.[7]

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[6] The Report provided:

> The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

McPherson, 146 U.S. at 34-35 (quoting Senate Rep., 1st Sess., 43 Cong. No. 395 at 9).

[7] *See* Richard A. Epstein, SYMPOSIUM: BUSH V. GORE: "'In Such Manner as the Legislature Thereof May Direct': The Outcome in *Bush v. Gore* Defended," 68 U. CHI. L. REV. 613, 620 (Summer 2001) ("[I]n this case, the strong federal interest in the selection of the President of the United States makes it appropriate for federal courts to see that all state actors stay within the original constitutional scheme. ... If therefore the state courts or state executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II"); Michael W. McConnell, SYMPOSIUM: BUSH V. GORE: "Two-and-a-Half Cheers for *Bush v. Gore*," 68 U. CHI. L. REV. 657, 661 (Summer 2001) ("By specifying 'the Legislature' [in U.S. CONST. art. II, §1, cl.2] as the source of

For federal elections (presidential as in *Bush*, congressional as in this case), where the national interest is supreme and uniformity of standards is important, federal law provides the ceiling against which state regulation of elections are tested. Neither the state constitution nor the state judiciary can impose substantive standards more stringent than, or at variance with, federal law, nor can the state courts interpret state law or the state constitution in a manner that frustrates the federal delegation.

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state law, this Clause departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions"). *See also* Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (Princeton Univ. Press 2001) at 110-11:

> Normally the U.S. Supreme Court defers to a state supreme court's interpretation of the state's statutes. But if Article II grants authority to state legislatures, it may authorize the Supreme Court to protect the prerogative thus granted. The Constitution having appointed a particular organ of state government to be the Presidential election rulemaker, it is a question of federal law whether the state judiciary has allowed the designated organ to determine the manner in which the state shall select its Presidential electors. ... The power to appoint the electors is a federal power that the states exercise as agents of the federal government. By assigning to state legislatures the task of determining the manner by which federal electors would be picked, Article II may be supposed to have federalized disputes over whether the authority thus granted to those legislatures has been usurped by another branch of state government, including a court that invokes a vague provision of the state's constitution to displace the legislature's authority and in effect write its own election code.

The task of congressional redistricting is explicitly assigned by the federal constitution to the state legislatures, which are, by their very nature, political entities. As this Court has repeatedly recognized, congressional redistricting is inherently a political process. *See e.g.*, *White v. Weiser*, 412 U.S. 783, 794-96 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). This political task should not be subject to being usurped by a state court – generally a less representative entity than a state legislature, whose members, if elected, perform a very different function in state government. Yet, this is the inevitable consequence if a state court interprets a state constitution in a manner that frustrates the federal delegation, as this Court does not have the option to act as a final arbiter of state constitutional interpretation.[8] By interpreting U.S. CONST. art. I, §4 to federalize congressional redistricting, state inter-branch power struggles can be avoided.

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[8] *See also* McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," *supra* n.7 at 661-662 (offering two "functional justifications" for why the framers of the Constitution assigned the task of defining the method of appointing electors to the state legislatures under U.S. CONST. art. II, §1, cl. 2: "First, the provision ensures the manner of selecting electors will be chosen by the most democratic branch of the state government" and "Second ... legislatures, in contrast to courts and executive officials, must enact their rules in advance of any particular controversy."); Posner, BREAKING THE DEADLOCK, *supra* n.7 at 156 ("there is much to be said for an interpretation of 'Legislature' in Article II that by forbidding gubernatorial and state judicial involvement in the selection of electors, except insofar as the legislature expressly delegates a role in that selection to the governor or the courts, minimizes the risk of an interbranch dispute").

This is not to say that state constitutions are always irrelevant in the congressional redistricting context; any substantive protections they might provide simply cannot exceed those imposed by the federal Constitution.[9] Where a state constitutional provision is interpreted in the same manner as its federal counterpart, state constitutional claims raised in the context of congressional reapportionment would have no independent vitality but would merge with federal constitutional claims raising the same challenges. For example, the equal protection guarantee of the Pennsylvania Constitution is the same as that of the federal constitution. *See Erfer*, 794 A.2d at 332 (right to equal protection under state constitution is "coterminous with its federal counterpart") (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137 (Pa. 1991)).

Actions of a state legislature taken pursuant to U.S. CONST. art. I, §4 are subject only to federal substantive requirements.

III. Application

In this case, Appellants did not raise any federal law-based challenges in the state court. Instead, citing the failure of the Mississippi Legislative Standing Joint Congressional Redistricting Committee to timely submit a new congressional redistricting plan as required by state law, they simply asked the state court to adopt a plan. As explained above, however, consistent with U.S. CONST. art. I, §4, a state court may only act to draw a congressional redistricting plan where it has adjudicated and found a

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[9] *Amici* do not mean to suggest that legislatively-enacted congressional redistricting plans are immune from challenges based on state constitutional requirements pertaining to the procedure for enacting legislation.

violation of federal law.[10] As that did not occur here, it was appropriate for the federal three-judge court below to find the state court plan unconstitutional.

CONCLUSION

Amici respectfully request the Court to affirm the decision of the three-judge court below but on the narrower ground of the interpretation of U.S. CONST. art. I, §4 advocated herein.

Respectfully submitted,

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[10] In a situation such as occurred in Mississippi, where a state legislature is unable or unwilling to discharge the authority delegated to it by U.S. CONST. art. I, §4, both the state and federal courts would have the authority to adjudicate whether that failure violated any federal law. Here, however, Appellants alleged only that the failure violated state law.